CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 125

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

vs.

MATTHEW BROWN, TRUSTEE.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR CERTIORARI FILED JUNE 13, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 125

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

vs.

MATTHEW BROWN, TRUSTEE.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

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Supreme Court of the United States.

OCTOBER TERM, 1935.

No.

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, TRUSTEE,
RESPONDENT.

TRANSCRIPT OF RECORD OF MUNICIPAL COURT.

WRIT.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. AT THE MUNICIPAL COURT OF THE CITY OF BOSTON, holden at said Boston, within the County of Suffolk, for civil business, on the tenth day of June, A. D., 1933.

Matthew Brown, Trustee in Bankruptcy of the Metropolitan Builders' Supply Company----------Plaintiff,

vs.

Palmer Clay Products Company, a corporation, Defendant.
the Plaintiff appears and enters his action in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To the Sheriffs of our several Counties, or their Deputies, or any constable of any City or Town within our said Commonwealth:

(L. S.)_____ GREETING.

WE COMMAND you to attach the goods or estate of Palmer Clay Products Company, a corporation duly organized by law and having an usual place of business in Boston, in our County of Suffolk, to the value of Four Thousand Dollars; and summon the said Defendant (if he may be found in your precinct,) to appear before our Justices of the Municipal Court of the City of Boston, to be holden at Boston, within our County of Suffolk, for civil business, on Saturday, the 10th day of June, A. D., 1933, at nine of the clock in the forenoon; then and there to answer to Matthew Brown, Trustee in Bankruptcy of the Metropolitan Builders' Supply Company, a corporation duly organized by law and having an usual place of business in Chelsea, in the County of Suffolk,_____ in an action of contract_____ To the damage of the said Plaintiff, (as he says) the sum of Four Thousand Dollars, as shall then and there appear, with other due damages. And have you there this Writ with your doings therein.

WITNESS, WILFRED BOLSTER, ESQUIRE, at Boston aforesaid, the 23rd day of May, in the year of our Lord one thousand nine hundred and thirty-three.

WILLIAM F. DONOVAN, *Clerk.*

Upon which is the following, to wit:—

"SUFFOLK, ss. BOSTON, June 3, 1933.

By virtue of this Writ, I this day attached a chip as the property of the within-named defendant corporation, PALMER CLAY PRODUCTS COMPANY, and afterwards on the same day summoned it to appear and answer at Court as within directed by delivering to C. A. PALMER, its Secretary and the officer in charge of its business, a summons, to-

gether with an attested copy of this Writ, and in the service hereof it was necessary and I actually used a motor vehicle 5 miles.

FEES:		
	Service	$1.00
	Copy	.50
	Travel	.50
	Motor Vehicle	.75
		$2.75

JOHN H. HORGAN,
Deputy Sheriff."

DOCKET ENTRIES.

DECLARATION filed at time of entry—copy herewith annexed. (as amended)

And the further consideration of said action is thence adjourned to the thirteenth day of June, A. D., 1933.

And on the said thirteenth day of June, the said Defendant corporation files its answer. — copy herewith annexed.

And the further consideration of said action is thence continued or adjourned from time to time until the twenty-first day of November, A. D., 1933.

And on the fourteenth day of said June, Interrogatories to Plaintiff filed.

And on July eighteenth, A. D., 1933, Plaintiff ordered to Answer Interrogatories on or before July 28, 1933, or non-suit to be recorded.

And on said twenty-eighth day of July, Plaintiff nonsuited.

And on the twenty-ninth day of said July, Non-suit off and Plaintiff answers Interrogatories by consent.

And on the second day of August, 1933, Defendant's motion for further answers filed.

And on the nineteenth day of September, 1933, Interrogatories to Defendant.

And on the ninth day of October, 1933, motion to default filed.

And on the thirteenth day of said October, Defendant

ordered to answer Interrogatories on or before October 23, 1933; or a default to be recorded.

And on the said twenty-third day of October, Defendant defaulted.

And on the twenty-seventh day of said October, Judgment for Plaintiff for $2,231.93 Damages and Costs $9.75.

And on the fourth day of November, 1933, Judgment vacated and Default removed and answers to Interrogatories filed by consent.

And on the sixteenth day of said November, Motion to Amend Declaration filed.

And on the said sixteenth day of November, motion to assign for trial.

And on the twenty-first day of November, Trial had. Motion to Amend Declaration allowed. Plaintiff files further Answers to Interrogatories. Both parties file Requests for Rulings.

And on the said twenty-first day of November, said action Continued for Advisement. Dowd, J.

And on the fifteenth day of December, 1933, Court finds for Plaintiff in the sum of $1,033.38 and interest from date of writ. Memo. of Rulings and Findings filed.

And on the eighteenth day of said December, Defendant files Motion for New Trial.

And on the said eighteenth day of December, Defendant files Request for Report.

And on the twentieth day of said December, Defendant files Draft Report.

And on the tenth day of January, 1934, Defendant files Motion.

And on the thirteenth day of said January, after hearing on Plaintiff's motion to reopen case for submission of further evidence, the Court revokes findings heretofore made and finds for Plaintiff in the sum of $1,688.29, with interest from date of writ. Memo. of Rulings and Findings filed.

And on the fifteenth day of said January, Defendant files Request for Report.

And on the sixteenth day of said January, Defendant files Draft Report.

And on the twenty-first day of February, 1934, Defendant waives motion for new trial by Leave of Court. Dowd, J.

And on the twenty-fourth day of March, 1934, Report filed and allowed.

And on the thirty-first day of said March, Defendant files Copies of Report.

And on the second day of April, 1934, Plaintiff files Briefs.

And on the fourth day of said April, Defendant files Briefs.

And on the fifth day of said April, Amendment to Report filed and allowed.

And on the ninth day of said April, Arguments on Report, Decision reserved.

And on the sixteenth day of May, 1934, Report Dismissed by order of the Appellate Division. Opinion on file.

And on the eighteenth day of said May, Defendant files Claim of Appeal to the Supreme Judicial Court.

And on the twenty-eighth day of May, 1934, Defendant files Request to Report, record for appeal, etc.

And on the said twenty-eighth day of May, Notice to Defendant that $85.- is estimated cost of preparing record for Appeal to Supreme Judicial Court.

And on the thirteenth day of June, 1934, on Defendant's motion time for perfecting Appeal extended to June 27, 1934, inclusive, by Appellate Division.

And on the twenty-fifth day of June, 1934, Defendant deposits $85.- to perfect Appeal to Supreme Judicial Court.

And on the eighth day of August, 1934, Notice to Defendant of readiness of copies of record for entry in Supreme Judicial Court.

And on the ninth day of said August, copies delivered to Defendant for entry in Supreme Judicial Court.

And on the sixth day of March, 1935, Rescript received from the Supreme Judicial Court, the same being in the words following, to wit:—

ORDERED, that the Clerk of said Court in said County make the following entry under said case in the docket of said Court; viz.:—

Order dismissing report affirmed.

By the Court,
WALTER F. FREDERICK, *Clerk.*

MARCH 5, 1935.

And on the eleventh day of said March, Defendant's motion for stay of execution filed, the same being in the words following, to wit:—

"NOW COMES the Defendant in the above-entitled action and moves that the issuance of the execution therein be stayed pending the decision of a petition to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court entered in this case.

By its Attorneys,
F. PAUL WELSCH.
EDWARD F. SMITH.

CERTIFICATE OF NOTICE.

I, Edward F. Smith, Attorney for the Defendant in the above-entitled action, do hereby certify in behalf of the above-named Defendant, that I this day notified the Plaintiff that I would on Monday, March 11, 1935 at 9:30 A. M. present the Defendant's Motion for Stay of Execution to the Court for allowance in the Fourth Session (Room 318) of the Municipal Court of the City of Boston. Said notice, containing a copy of the proposed motion, was mailed, postage prepaid, directed to Matthew Brown, Esq., One State Street, Boston, Mass. Dated at Boston, Mass., March 7, 1935.

EDWARD F. SMITH,
Attorney for Defendant.

Said motion heard and allowed upon the filing of a bond in the amount of $2,000.00 on or before March 15, 1935, at 10.00 A. M. Good, J.

COMMONWEALTH OF MASSACHUSETTS.

MUNICIPAL COURT OF THE CITY OF BOSTON,

SUFFOLK COUNTY.

MATTHEW BROWN, TRUSTEE,
METROPOLITAN BUILDERS' SUPPLY COMPANY,

v.

PALMER CLAY PRODUCTS COMPANY.

REPORT AS AMENDED.

This is an action of contract by the plaintiff, as trustee in bankruptcy, to recover from the defendant certain payments allegedly made by the bankrupt, Metropolitan Builders' Supply Company, to the defendant, which payments are alleged by the plaintiff to be preferences.

The answer is a general denial.

At the trial there were introduced in evidence by the plaintiff for the purpose of showing the financial condition of the Metropolitan Builders Supply Company certain balance sheets, marked Exhibits III and IV at the trial, which balance sheets were prepared by a certified public accountant from figures taken from the books of said company, copies of said balance sheets being hereto attached and made a part of this draft report.

At the trial there was evidence for the plaintiff on the part of Joseph Starr, President of the Metropolitan Builders Supply Company, that he had been selling construction materials for nine or ten years for several concerns and that he bought and sold the building materials for the Metropolitan Builders Supply Company; that in his opinion the fair value of the merchandise inventory as of November 1, 1932 on the balance sheet marked Exhibit IV was only Four Thousand Five Hundred Dollars ($4,500.00) instead of Six Thousand Nine Hundred Eighty-Six Dollars and Thirty-Two Cents ($6,986.32) and that the accounts receivable as of the same date in his opinion were worth

only Four Thousand Dollars ($4,000.00) instead of Four Thousand Eight Hundred One Dollars and Seventy-Three Cents ($4,801.73); that in his opinion the fair value of the merchandise inventory as of December 1st, 1932 as shown on the balance sheet marked Exhibit III was worth only Twenty-Eight Hundred Dollars ($2,800.00) instead of Four Thousand Seven Hundred Thirty-Five Dollars and Fifty-Seven Cents ($4,735.57) and that the fair value of the accounts receivable as of the same date was only Four Thousand Five Hundred Dollars ($4,500.00) instead of Seven Thousand Eight Hundred Eighty-Eight Dollars and Sixteen Cents ($7,888.16); that as of January 14th, 1933, in his opinion, the fair value of the merchandise on hand would be One Thousand Dollars ($1,000.00) and the fair value of the accounts receivable Two Thousand Dollars ($2,000.00); that as of January 15th, 1933 the Metropolitan Builders Supply Company owed in current liabilities Fourteen Thousand Nine Hundred Dollars ($14,900.00).

At the trial there was evidence for the plaintiff on the part of said Joseph Starr that he first discussed the question of credit with Claude A. Palmer and Charles A. Palmer of the defendant company in August of 1932; that thereafter, on September 6th or 8th, 1932 he had a conference with both Palmers and that Claude A. Palmer refused to give the Metropolitan Builders Supply Company any credit until Starr secured a guarantee from Louis B. Cadario & Sons; that he thereupon secured the guarantee of Louis B. Cadario & Sons, (a copy of which guarantee is hereto attached) and brought it to the defendant and that the defendant then shipped the Metropolitan Builders Supply Company a bill of goods; that he asked for merchandise shortly after November 8th, 1932 and was told by Charles A. Palmer that the Metropolitan Builders Supply Company could not have any more merchandise until the back bills were paid up and that he then told Charles A. Palmer that the Metropolitan Builders Supply Company was unable at that time to meet the obligation but that it had plenty of accounts receivable and that it expected more money from the Cadarios; that he had never told the defendant that the Metropolitan Builders Supply Company had Ten Thousand

Dollars ($10,000.00) in the bank; that he told the defendant that the Metropolitan Builders Supply Company had no cash at the time, but that it expected to get some good jobs and that it had the backing of Louis B. Cadario & Sons; that Helen M. Weldon, Treasurer of the company, made out a check for Seven Hundred Thirty-Five Dollars and Fifty-Eight Cents ($735.58) to the defendant; that he went to the defendant's office and saw Charles A. Palmer; that he told Palmer that he expected money in on Monday and to hold the check; that the defendant deposited the check several days later and that it came back from the bank unpaid.

There was evidence for the plaintiff on the part of said Helen M. Weldon that she kept the books of account of the Metropolitan Builders' Supply Company; that according to the books of account the payments shown to have been made under date of November 24, 1932, in the amounts of One Hundred Forty-Three Dollars and Sixty-Four Cents ($143.64) and Four Dollars and Seventy-Nine Cents ($4.79) were made to the railroad company in payment of freight charges on merchandise shipped to the Metropolitan Builders Supply Company by the defendant; that the Metropolitan Builders Supply Company never received the sum of One Thousand Dollars ($1,000.00) on August 16, 1932 or the sum of Fifteen Hundred Dollars ($1,500.00) on September 7th, 1932, which sums were listed in the books of the Metropolitan Builders Supply Company as having been received from Louis B. Cadario & Sons; that the books did not show the actual worth of any of the assets of the Company as of November 1st, 1932 or any other date.

There was evidence for the defendant on the part of the said Charles A. Palmer that Joseph Starr told him when he first approached him (Palmer) for credit that he had formed a new company and that he had the backing of Louis B. Cadario & Sons; that the company was starting with Ten thousand dollars ($10,000.00) in cash and that Starr throughout their business transactions "constantly built up the Metropolitan Builders Supply Company's credit" with him; that the books of account of the defendant company were kept under his supervision; that accord-

ing to said books of account the following payments were the only payments received by the defendant on the Metropolitan Builders Supply Company account:

October 15, 1932	$390.92
December 6, 1932	400.00
December 14, 1932	654.91
January 3, 1933	400.00

that according to the defendant's books of account the defendant between the dates of October 17, 1932 and November 8, 1932 shipped to the Metropolitan Builders Supply Company merchandise in the amount of Fourteen hundred dollars ($1,400.00) after the Three hundred ninety dollars and ninety-two cents ($390.92) payment had been received by the defendant on October 15, 1932, from the Metropolitan Builders Supply Company.

The said Charles A. Palmer, called as a witness for the plaintiff, testified that on or about the sixth day of September, 1932 Starr came to the defendant's office and talked with him; that Starr told him he had formed the Metropolitan Builders Supply Company and wanted to purchase merchandise from the defendant on credit; that he told Starr that this was a new company and that he would have to have the figures of this corporation; that Claude A. Palmer joined them and asked Starr about the assets of the company and Starr hedged; that Starr then said, "Will it be satisfactory if I give you a guarantee of L. B. Cadario & Sons?" and that Claude A. Palmer then said "O. K."; that on September 8th Starr came in and gave him the guarantee and they accepted the orders; that he told Starr they wanted their money on fifteen day terms; that they received a check on October 15th; that between September 9th and October 8th, 1932 the defendant shipped the Metropolitan Builders Supply Company merchandise amounting to One Thousand and Eight Dollars ($1,008.00); that it was about forty days after the first shipment that they got their first payment; that during that time they had sent numerous letters and made 'phone calls demanding payment of their money; that between October 15th and November 8th they received no further moneys; that on or about November 28th Starr gave them a check of the Metropolitan Builders Supply Company for

Seven Hundred Thirty-Five Dollars and Fifty-Eight Cents ($735.58); that the defendant deposited the check several days later, but that it came back from the bank unpaid on or about December 5th or 6th; that he insisted on getting some money and took the matter up with the guarantors and got a check for Four Hundred Dollars ($400.00) from Louis B. Cadario & Sons; that he got Six Hundred Fifty-Four Dollars and Ninety-One Cents ($654.91) on December 14th; that the last payment received by the defendant was on January 3rd; that he sold no further goods to the Metropolitan Builders Supply Company after November 8th; that Mr. Starr gave him the "usual debtor's stall" whenever he asked for money; that the bills to the Metropolitan Builders Supply Company included freight and merchandise, as this was their method of billing; that the check for Seven Hundred Thirty-Five Dollars and Fifty-Eight Cents ($735.58) from Starr came back; that he demanded payment right along from Starr persistently; that Starr gave him hard luck stories about collections being slow.

F. Paul Welsch, Esq., called as a witness for the plaintiff, testified that he was an attorney at law; that he was employed by the defendant on this account on or about November 15th; that on that date he had 'phoned the Metropolitan Builders Supply Company demanding payment and on the same date confirmed the telephone conversation with a letter; that on the 18th he sent a regular "form letter" which stated, in substance, that if payment was not received he would institute legal proceedings; that on November 29th he was told by the defendant to close the account; that he never received any money from the Metropolitan Builders Supply Company.

There was evidence for the defendant on the part of John Cadario that he was a member of the firm of Louis B. Cadario & Sons; that some time in September, 1932, he had a talk with the defendant about giving it a guarantee; that a guarantee went out of his office signed by him and that he has it back; that some money was sent to the defendant; that he may have sent the defendant between Three hundred dollars ($300.00) and Five hundred dollars ($500.00), but that he wasn't sure and that it might have

been more or less.

There was evidence for the plaintiff on the part of Arthur Burns, Chief Clerk of the Sheriff's Office of the County of Suffolk, that a keeper was placed on the premises of the Metropolitan Builders Supply Company on the 15th of December, 1932, and remained there through the 17th; that a second keeper was placed on the premises on the 16th, who remained through the 17th; that on December 21st a third keeper was placed on the premises of the company and that this keeper remained on the premises through January 31st; that attachments of the bank account of the Metropolitan Builders Supply Company in the Broadway National Bank in Chelsea were made on November 12th and at divers other times.

There was evidence for the defendant on the part of Claude A. Palmer and Charles A. Palmer that at no time was it ever called to their attention that there were keepers on the premises of the Metropolitan Builders Supply Company or that there were attachments on this company's bank account.

At the trial the defendant introduced in evidence the books of the Metropolitan Builders Supply Company which showed the following payments on the account of the Palmer Clay Products Company after November 1st, 1932:

November	5th, 1932	$143.64
	25th, 1932	143.64
	25th, 1932	4.79
December	5th, 1932	400.00
	6th, 1932	425.94
	13th, 1932	654.91
	29th, 1932	459.01

At the close of the trial and before the final arguments the defendant made certain requests for rulings, a copy of which is herewith annexed and made a part of this draft report.

The Court did not act on request #5 and denied requests numbered 8 and 11. In passing upon request #8 the Court said:

"Not a correct statement of the law. . . . Preference is determined as of the date of filing the petition."

The Court found the following facts:

"I find that on November 8, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders Supply Company was insolvent and, 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class. I find that the payments made by the guarantors on December 6, 1932, and December 14, 1932, were not preferential payments."

Some time after the trial, to wit, on January 11, 1934, the Court allowed a motion by the plaintiff to reopen the case for the submission of further evidence. At the hearing of said further evidence, the plaintiff, through the Cashier of the bank on whom the check was drawn, offered in evidence a certified check for Six hundred fifty-four dollars and ninety-one cents ($654.91) signed by the Treasurer of the Metropolitan Builders Supply Company and payable to the defendant. On the back of the check was stamped the name of the defendant. The Cashier testified that it was the custom of the bank to retain in its possession certified checks which had been paid by it; that the check in question, according to the records of the bank, had been paid.

The trial judge, subject to the objection of the defendant, admitted said check in evidence, saving the defendant's rights.

The Court thereupon revoked the general finding heretofore made and increased the finding of the plaintiff by the addition of said check to One thousand six hundred eighty-eight dollars and twenty-nine cents ($1,688.29).

A copy of the memorandum prepared and signed by the Court is hereto annexed and made a part of this draft report.

This report contains all the evidence material to the

questions reported.

The defendant claiming to be aggrieved by the rulings and refusals to rule as requested, I hereby report the same to the Appellate Division for determination.

[Matthew Brown testified that an involuntary petition in bankruptcy was filed on January 14th, 1933 against the Metropolitan Builders Supply Company. It was agreed between counsel for the defendant and the plaintiff that the said Matthew Brown was duly elected Trustee in Bankruptcy of the said Metropolitan Builders Supply Company on the 28th day of February, 1933, and duly qualified.

[There was offered in evidence and accepted by the Court without exception by the defendant as secondary evidence a check stub of the Metropolitan Builders Supply Company drawn on the Broadway National Bank of Chelsea, dated December 13th, 1933, in the sum of $654.91 payable to the Palmer Clay Products Co.]*

THOMAS H. DOWD,
Asso. Justice.

Filed and allowed (Dowd, J.) March 24, 1934.

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*Added by amendment filed and allowed April 5, 1934.

EXHIBIT III

METROPOLITAN BUILDERS SUPPLY COMPANY BALANCE SHEET AS OF DECEMBER ONE, NINETEEN HUNDRED THIRTY-TWO.

Assets

Current:		
Cash on Hand	22.27	
Accounts Receivable	7888.16	
Merchandise Inventory	4735.57	
Total Current Assets		12646.00
Fixed Assets:		
Building	7173.01	
Furniture & Fixtures	210.88	
Total Fixed Assets		7383.89
Other Assets:—		
Insurance Premiums Unexpired		105.00
Total Assets		20134.89

Liabilities

Current:		
Accounts Payable	13276.80	
Cash Overdraft	71.21	
Loans Payable (Umansky)	300.00	
Total Current Liabilities		13648.01
Capital:		
Capital Stock	9082.53	
Surplus (Deficit)	2595.65	
Total Capital		6486 88
Total Liabilities and Capital		$20134.89

EXHIBIT IV

METROPOLITAN BUILDERS SUPPLY COMPANY BALANCE SHEET AS OF NOVEMBER ONE, NINETEEN HUNDRED THIRTY-TWO.

Assets

Current:		
Cash on Hand	52.79	
Accounts Receivable	4801.73	
Merchandise Inventory	6986.32	
Total Current Assets		11840.84
Fixed Assets:		
Building (Cost)	6800.00	
Furniture & Fixtures	208.75	
Total Fixed Assets		7008.75
Other Assets:—		
Insurance Premiums Unexpired		85.93
Total Assets		18935.52

Liabilities

Current:		
Accounts Payable	10713.57	
Cash Overdraft	370.64	
Loans Payable (Umansky)	300.00	
Accrued Expenses	82.00	
Total Current Liabilities		11466.21
Capital:		
Capital Stock	9028.53	
Surplus (Deficit)	1613.22	
Total Capital		7469.31
Total Liabilities and Capital		18935.52

LOUIS B. CADARIO & SONS
Contractors and Builders
Metropolitan Building
260 Tremont Street
Boston, Mass.

September 7, 1932.

PALMER CLAY PRODUCTS COMPANY
139 Washington Street
Somerville, Massachusetts

Gentlemen:

We, hereby, unconditionally guarantee any or all bills contracted by the Metropolitan Builders' Supply Company for the purchase of materials from you until further notice.

In view of the fact that it might hurt the credit standard of the Metropolitan Builders' Supply Company, which we assure you can obtain these materials without any such guarantee, we ask that the contents of this letter be kept in strict confidence. Any violation of this last sentence may result in the withdrawal of this guarantee and a subsequent loss thereby of future business for your company.

The writer thinks this sounds a little abrupt, but he hopes that you will see the seriousness of such a precedence being established.

Very truly yours,

LOUIS B. CADARIO & SONS
By: John A. Cadario (signed)
John A. Cadario

JAC:MW

DEFENDANT'S REQUEST FOR RULINGS.

Now comes the defendant in the above-entitled cause and requests that the following rulings be made:

1. That there is a presumption that the payments received in this case by the defendant are legal.

Gilbert's Collier on Bankruptcy, page 919.

2. The burden of proof is on the plaintiff, as trustee in bankruptcy, in seeking to recover the payments received

by the defendant to overcome the presumption that the payments are legal and to establish the essential elements of a voidable preference by a fair preponderance of the evidence.

3. If the evidence offered by the plaintiff merely goes so far as to show that there was nonpayment of the debt on demand by the defendant and circumstances sufficient to create a suspicion or fear of insolvency then such evidence is insufficient, as matter of law, to charge the defendant with notice so as to make a payment subsequently made before bankruptcy recoverable as a preference, and the Court must therefore find for the defendant.

Arthur v. *Harrington,* 211 Fed. 215.

4. In order to establish a finding for the plaintiff the Court must be satisfied that the plaintiff has sustained the burden of proving by a fair preponderance of the evidence:

(a) That a "transfer" of the property of the debtor has taken place.

(b) That the debtor at the time of the "transfer" was insolvent.

(c) That the transfer was made within four months before the filing of the petition in bankruptcy or after the filing and before the adjudication.

(d) The transfer must enable the creditor to obtain a greater percentage of his debt than any other creditors of the same class.

(e) The person receiving it must have had reasonable cause to believe that the enforcement of the transfer would effect a preference.

5. If the Court finds that the Metropolitan Builders Supply Co., through its President, Joseph H. Starr, concealed the true situation of the bankrupt corporation from the defendant, then the payments cannot be set aside as preferential and the Court should therefore find for the defendant.

Brown v. *Guichard,* 7 Am. Bankr. 515.

6. The plaintiff, as trustee in bankruptcy, must prove by a fair preponderance of the evidence that the Metropolitan Builders Supply Co. was, at the time of each

alleged preferential payment, insolvent and proof that it was in failing circumstances and unable to meet its debts is insufficient.

Remington on Bankruptcy, sec. 2290.

7. Ground for reasonable belief in the present inability of a debtor to pay his debts in the course of business are not necessarily grounds for believing that he is insolvent.

In re Pettingell, 135 Fed. 218, 14 Am. Bankr. 728.

8. The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received.

9. The mere fact that the Metropolitan Builders Supply Co. was unable to meet its obligations as they matured was not alone sufficient to cause the defendant to believe or have reasonable cause to believe that the defendant was insolvent.

10. The interpretation of the term "insolvency" which the Court must follow in determining whether the payments in question are recoverable as preferences is that set forth in Sec. 1, Subdiv. 15 of the U. S. Bankr. Act.

11. The defendant having shipped, subsequent to the October 15th payment, of $390.92, merchandise in an amount in excess of such payment, the assets of the Metropolitan Builders Supply Co. were not thereby depleted, and it follows therefore that, as matter of law, such payment is not preferential and cannot be recovered.

U. S. Bankr. Act, Sec. 60c.

Collier on Bankruptcy, page 924 (note 367).

9 A.B.R. 773.

11 A.B.R. 596.

12. That if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such credit remaining

unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

U. S. Bankr. Act, Sec. 60c

13. That Louis B. Cadario & Sons on September 7, 1932, guaranteed all bills contracted by the Metropolitan Builders Supply Co. with the defendant.

14. That the payments to the defendant of $400. on December 6, 1932 and $654.91 on December 14, 1932, by checks of Louis B. Cadario & Sons, guarantors of the account, are not, as matter of law, preferential payments within the meaning of the Bankruptcy Act, and cannot be recovered by the plaintiff.

Mason v. *Little Falls, etc. Bank,* 17 Fed. 529,

Affirmed 225 U. S. 178.

Catchings v. *Chatham Nat. Bank,* 180 Fed. 103.

Dressel, et al v. *North State Co.,* 119 Fed. 531.

15. That to constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting of the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt estate.

Dressel, et al v. *North State Co.,* supra.

16. That a payment received by a creditor of a bankrupt from a third party, and which did not come out of the assets of the bankrupt, does not constitute a preference.

Dressel, et al v. *North State Co.,* supra.

By its Attorney,

MEMORANDUM.

After notice and hearing on the plaintiff's motion to reopen the case for the submission of further evidence, at which hearing both parties were represented, the Court granted said motion. After hearing said further evidence, the Court being of the opinion that the finding now entered

does not conform to the facts which really existed, but were not presented at the original hearing, through no fault of the plaintiff, and in order to correct the record to make it conform with the facts, the Court now revokes the general finding entered. The Court further amends the finding of facts now filed by striking out the words and figures in said finding, to wit, "and December 14, 1932", the remainder of the finding to stand. The requests for rulings made by the defendant stand as disposed of, except request fourteen, which is not granted in so far as it refers to a certain check in the amount of $654.91 therein mentioned, for the reason that the Court finds that that check was paid, not by the guarantors, but by the bankrupt. A finding for the plaintiff is to be entered in the sum of $1,688.29, with interest from date of the writ.

THOMAS H. DOWD,
Associate Justice.

PLAINTIFF'S DECLARATION AS AMENDED.

And the plaintiff says that on or about the 14th day of January, 1933, there was filed against the Metropolitan Builders Supply Company, a Massachusetts corporation having an usual place of business in the City of Chelsea, in the United States District Court for the District of Massachusetts, an involuntary petition in bankruptcy as appears by case No. 52598 and that on the 27th day of January, 1933, the said corporation was duly adjudged a Bankrupt, and that on the 28th day of February, 1933, the plaintiff Matthew Brown was duly elected Trustee in Bankruptcy of the above Estate and duly qualified.

And the plaintiff further says that within four months preceding the filing of the aforesaid petition in bankruptcy, the Metropolitan Builders Supply Company was insolvent and indebted to the defendant on or about the 8th day of November, 1932, in the sum of $2,231.93.

That the aforesaid Metropolitan Builders Supply Company transferred by way of payment to the defendant about [$2,921.55]* in the sums and on the dates set forth

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*Amendment filed and allowed November 16, 1933.

in the account hereto annexed marked "A"; that no merchandise was delivered or credit extended by the defendant to the said Metropolitan Builders Supply Company subsequent to the 8th day of November, 1932; that said payments were made to the defendant while the said Metropolitan Builders Supply Company was insolvent and within four months of the filing of the petition in bankruptcy; that the defendant had reasonable cause to believe that the said payments would effect a preference; that if the defendant is allowed to obtain said payments it will obtain a larger percentage of its debt than any other creditor of the same class.

Wherefore the plaintiff says that the defendant owes it the sum of [$2,921.55],* plus interest.

By his Attorney,
HARRY HOFFMAN.

Filed June 10, 1933.

"A"

PALMER CLAY PRODUCTS CO.

to

MATTHEW BROWN, Trustee, Dr.

1932		
Nov. 5	— Cash	$143.64
" 25	— "	143.64
" 25	— "	4.79
Dec. 5	— "	400.00
" 6	— "	425.94
" 13	— "	654.91
" 29	— "	459.01
	Total —	[$2921.55]*
[Oct. 7, 1933	— Cash	$418.66]*
[" 25, "	"	129.93]*
[" 27, "	"	141 03]*

*Amendment filed and allowed November 16, 1933.

DEFENDANT'S ANSWER.

And now comes the defendant in the above-entitled action and for answer denies each and every claim, item, allegation and particular in the plaintiff's writ and declaration contained.

By its Attorney,
F. PAUL WELSCH.

Filed June 13, 1933.

FINAL ORDER OF APPELLATE DIVISION.

ORDERED, that the Clerk make the following entry under said case in the docket, viz.:—

Report dismissed.

By the Court,
WILLIAM F. DONOVAN,
Clerk

May 16, 1934.

DEFENDANT'S APPEAL.

Defendant appeals from the final decision of the Appellate Division dismissing the report to the Supreme Judicial Court.

By its Attorney,
F. PAUL WELSCH.

Filed May 18, 1934.

Copy.

Attest, *Clerk.*

IT IS THEREFORE considered by said Court that he, the said Plaintiff, recover against the said Defendant the sum of Eighteen Hundred Six Dollars and Twenty-Five Cents, damage, and costs of suit, taxed at Thirty-Six Dollars and Seventy-Five Cents.

Judgment date, March 15, 1935.

Damages,	$1806.25
Costs,	36.75
	$1843.00

WILLIAM F. DONOVAN,
Clerk.

Attest:

OPINION OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

CROSBY, J. This is an action of contract brought by a trustee in bankruptcy to recover from the defendant certain payments alleged to have been made by the bankrupt Metropolitan Builders Supply Company to the defendant, which payments are alleged by the plaintiff to be preferences. The answer was a general denial.

It appeared that on January 14, 1933, an involuntary petition in bankruptcy was filed against the Metropolitan Building Supply Company and Matthew Brown was duly elected trustee in bankruptcy of the company on February 28, 1933, and duly qualified. At the close of the trial, the defendant made certain requests for rulings. The judge denied request numbered 8 which was as follows: "The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received." In passing upon this request he said: "Not a correct statement of the law. . . . Preference is determined as of the date of filing the petition." The judge found that "on November 8, 1932, and thereafter, the defendant had reasonable cause (1) to believe that the Metropolitan Builders Supply Company was insolvent and (2) that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class . . ." He found for the plaintiff in the sum of $1,688.29, with interest from the date of the writ. The case was reported to the Appellate Division. The report was dismissed, and the defendant appealed.

The only question argued by the defendant before this court is as to the time when a preference is to be determined. It is the contention of the defendant (1) that whether a payment operates as a preference is to be determined at the time it is made, or not at all; and (2) that whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of

its debt than other creditors of the same class is to be determined as of actual payment or transfer. The question presented involves the construction of § 60 a, b, of the bankruptcy act (Act of July 1, 1898, c. 541; 30 U. S. Sts. at Large, 544, 562, as amended by Act of February 5, 1903, 32 U. S. Sts. at Large, 799, c. 487, § 13, and by Act of June 25, 1910, 36 U. S. Sts. at Large, 842, c. 412, § 11). The defendant relies upon certain Federal cases which support its contentions. See *W. S. Peck & Co.* v. *Whitmer*, 231 Fed. Rep. 893; *Haas* v. *Sachs*, 68 Fed. Rep. (2d) 623. The construction of § 60, a, b, in these cases is directly contrary to that given by this court to the same section in *Rubenstein* v. *Lottow*, 223 Mass. 227. No decision of the Supreme Court of the United States interpreting this section in the present particular has been cited and none has been found. The case of *Rubenstein* v. *Lottow* is controlling. No occasion is presented for overruling it. *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 203 Mass. 159, 196. It has been referred to with apparent approval in *Cohen* v. *Goldman*, 250 Fed. Rep. 599, 601. It was likewise cited in a recent decision of this court discussing § 60 a of the bankruptcy act. *Baker* v. *Chisholm*, 268 Mass. 1, 7. In the absence of a contrary decision by the Supreme Court of the United States it must be accepted as sound and determinative of the present case. *County of Berkshire* v. *Cande*, 222 Mass. 87, 89. *Morse* v. *Stober*, 233 Mass. 223, 227. Unless and until the Supreme Court of the United States reaches a contrary conclusion, State courts are not precluded from exercising their own judgments upon questions involving Federal statutes. They are not concluded by decisions of other Federal courts. *Gehlan* v. *Patterson*, 83 N. H. 328, 330. *Noble* v. *Dibble*, 119 Wash. 509, 511. *Burnham* v. *Fort Dodge Grocery Co.*, 144 Iowa 577, 580. *Nebraska State Bank* v. *Citizens State Bank*, 122 Neb. 522, 526. However respectful consideration should be given to decisions of Federal circuit courts of appeal. The cases cited by the defendant have been examined. We realize that uniformity in the interpretation of the bankruptcy act is desirable. Nevertheless we are of opinion that the case

of *Rubenstein* v. *Lottow, supra,* should not be overruled. The construction of § 60 a, b, of the act adopted by the Appellate Division in this case was warranted.

It follows that there was no error in the denial of the defendant's eighth request.

Order dismissing report affirmed.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935.

The petition herein for a writ of certiorari to the Municipal Court of the City of Boston, County of Suffolk, Commonwealth of Massachusetts, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.